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By Alex Guillén | 9/28/12 6:03 AM EDT

With help from Darius Dixon and Darren Samuelsohn

**PREVIEWING FIRST MONDAY:** The Supreme Court starts its fall term Monday with a complicated torts case arising from the executions of anti-drilling activists in Nigeria, then shifts its environmental focus back to its recent favorites — property rights and the Clean Water Act.

There aren't any energy blockbusters on tap this term — the big D.C. appeals circuit cases over greenhouse gas regulations and other Obama administration EPA rules aren't yet ripe for high court review. But in the widely watched case regarding the deaths of anti-oil-drilling activists abroad, the court has the chance to weigh in once again on the same corporations-as-people doctrine that played such a big role in *Citizens United*. Erica Martinson, Jessica Meyers and a cardboard cutout of William Shatner with a drawn-on moustache have the preview for Pros: <http://politico.pro/RnbvgP>

**HAPPY FRIDAY** and welcome to Morning Energy, where we're taking a day off to chase after the Nutella food truck (<http://gaw.kr/VQAydm>). Andrew Restuccia is kindly filling in on Monday, so send your energy news to [arestuccia@politico.com](mailto:arestuccia@politico.com) and give him a follow on Twitter @AndrewRestuccia, @Morning\_Energy and @POLITICOPro.

**BROWNER HINTS AT BIG THINGS IN SECOND OBAMA TERM:** On a conference call with Obama campaign supporters last night, former White House climate adviser Carol Browner hinted at big things to come if Obama is re-elected. "We know there's more work to do to defend the progress we've made. We've achieved a remarkable amount in 50 years," Browner said, referring to the 50th anniversary of the publication of "Silent Spring." "But the decisions we make in the next four will have a lasting impact on generations to come."

Browner later assured supporters energy would be a cornerstone in a second Obama term: "I can tell you, having spent two years in the White House with the president that this is not a fad. The president believes deeply in these issues."

**HELLER, BERKLEY BATTLE ON ENERGY:** Sen. Dean Heller (R-Nev.) and challenger Rep. Shelley Berkley (D-Nev.) went at it in a debate last night in which the phrase "Big Oil" was tossed around like Halloween candy. Here's a rundown of their major back-and-forth over energy policy.

Heller starts with "all of the above" policy: "I'm for an 'all of the above' policy. I believe we ought to be concentrating here in North America. See, the difference between myself and my opponent is she thinks our oil ought to come from the Middle East," Heller said, also touting votes he's cast for a renewable portfolio standard. "In fact, as a Republican, I voted against my party for the renewable standards because I think it's critically important that we have goals set so that we can move forward on these particular issues."

Berkley hit back: "Now, my opponent, in spite of what he said, he voted to slash investments in renewable energy companies while he voted nine times to give tax breaks to big oil companies. Now I know that this state has an abundance of sun and wind and geothermal — we need to harness this energy, put people back to work, good-paying jobs in the state of Nevada that can't be shipped overseas."

Heller criticizes Berkley's investments: "It's amazing how my opponent loves to demonize certain industries. But in this case obviously it's the oil industry at this point, and all these dirty profits that she's talking about. There's only one person in this race that's invested in Big Oil — invested millions of dollars into Big Oil — and that's my opponent." According to the Center for Responsive Politics, Berkley has reported holding stock in a number of energy and mining companies, including Anadarko Petroleum, Chesapeake Energy, Occidental Petroleum and Rio Tinto.

**THE SAGE-GROUSE** also got its shining moment when moderators brought up the bird whose potential addition to the federally protected species list has drawn criticism that its habitat is in prime energy extraction and agriculture land. Berkley and Heller agreed the sage-grouse shouldn't be listed as endangered, and Berkley called for efforts to preserve and even expand the sage-grouse's habitat "so that the state of Nevada and other Western states aren't devastated economically by having the sage-grouse listed as an endangered species."

Heller: "If this president gets re-elected, he's going to list the sage grouse, and frankly I believe he's going to list it with the support of my opponent. And think of the impact that would have on the environment, the ability to create jobs here in Nevada."

**TASTES LIKE CHICKEN?** Heller noted he's eaten sage grouse. Berkley said she has not.

**EX-IM BANK GIVES \$5 BILLION LOAN FOR SAUDI PETROCHEMICAL COMPLEX:** Reuters reports: "The U.S. Export-Import Bank has approved a record-breaking \$4.975 billion direct loan to help build a petrochemical complex in Saudi Arabia, the bank said on Thursday. The loan to the Sadara Chemical Company, a joint venture between Dow Chemical Co and Saudi Arabian Oil Co, is the biggest in the bank's history and 'will support more than 18,000 American jobs across 13 states,' Ex-Im Bank President Fred Hochberg said in statement." Reuters: <http://reut.rs/VPCd2S>

**FERC COMMISSIONER SLAMS DISCONNECT WITH EPA ON COAL, RELIABILITY:** Federal Energy Regulatory Commission member Philip Moeller released a statement last night laying it on about the disconnect between his agency and EPA when it comes to coal plants and electric reliability. In a comment to supplement a FERC order last week conditionally approving tariff changes proposed by the Midwest ISO to help maintain reliability, Moeller said "[T]he critical question is not whether the owners of coal plants will retire or retrofit their plants as required by EPA, the critical question is whether government can move quickly enough in granting permission."

MISO must submit additional information to FERC within 180 days before a public comment period can begin. And while he defended public participation, Moeller said that last week's order "illustrates why the Federal Power Act and our longstanding policies implementing that act were never designed to accommodate the time limitations that have now been imposed by the EPA upon the owners of coal plants." Moeller's statement: <http://1.usa.gov/Rm7yZV>. Last week's order: <http://1.usa.gov/Osx6Gr>

**CLINTON CALLS FOR MOVEMENT ON EXPANDING ELECTRICITY ACCESS IN AMERICAS:** North and South American nations need to buckle down and make progress on a plan to provide universal access to electricity on those continents over the next decade, Secretary of State Hillary Clinton said at the Connecting the Americas 2022 Ministerial in New York City yesterday. "I think this is a win-win. I know that there are problems between countries, between private sector partners and public sector partners. I am certainly not naive about that. I get it," Clinton said. "But this is a time for leadership and it's a time to seize opportunities that will make everybody richer, and I'm all for that. And so let's make sure that we have universal access to electricity in this hemisphere."

**SPOTTED:** At a Romney fundraiser at Washington's Renaissance Hotel last night: House Energy and Power Subcommittee Chairman Ed Whitfield (R-Ky.).

**\*\* A message from America's Natural Gas Alliance:** Natural gas is creating jobs and adding tremendous value to state economies across the country. Curious what the role of this clean abundant resource is in your state? Visit our interactive map at <http://bit.ly/QvCZMY>. \*\*

**AUDUBON, CONSERVAMERICA PRESS FOR POLITICAL AGREEMENT ON CONSERVATION:** The National Audubon Society and the green GOP group ConservAmerica are teaming up to create the American Eagle Compact, a campaign to press for bipartisan agreements on conservation and energy issues. "The spin-obsessed suits in Congress and in statehouses across the country have turned conservation from the great unifier that it once was into a wedge used to divide Americans," Audubon CEO David Yarnold writes on the group's website, which also features a pledge calling for "common sense conservation action": <http://bit.ly/QzFmmy>

**SENATORS HAVE QUESTIONS ON EPA GUIDANCE:** Five senators are seeking more information about EPA's draft permitting guidance for using diesel fuels in fracking activities. In a letter, Sens. Jim Inhofe (R-Okla.), Lisa Murkowski (R-Alaska), John Hoeven (R-N.D.), Mary Landrieu (D-La.) and Joe Manchin (D-W.Va.) outline concerns over "the impetus of this guidance, its vagueness and lack of certainty if provides to states and businesses, its impacts on states that have been delegated primacy for the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), and the additional requirements that will be imposed on permit writers in primacy states." The letter: <http://politico.pro/OZgFRS>

**CAP PAPER COMPARES OBAMA, ROMNEY ON ENERGY:** A paper out today from the liberal Center for American Progress compares Obama and Romney's positions and achievements on energy issues like tax breaks for oil companies, clean energy, the Keystone XL pipeline and climate change. From the paper: "President Barack Obama's first term featured the adoption of essential toxic and carbon pollution reduction measures to protect public health. ... Gov. Mitt Romney's energy agenda couldn't be more different. He would undo new safeguards from mercury, carcinogens, soot, and smog from industrial sources." More: <http://bit.ly/NU5NDg>

**ENTERGY SUES DOE OVER NUCLEAR WASTE COLLECTION:** An Entergy Corp. subsidiary has become the latest nuclear plant operator to sue the Energy Department for not collecting nuclear waste that the federal government was supposed to start picking up in 1998 — and demanding \$100 million. Entergy Nuclear Palisades operates the Palisades plant in Covert, Mich., and a decommissioned facility in Charlevoix, Mich., both of which are storing nuclear waste overdue for a pickup. Taxpayers have already handed over \$1.6 billion to utilities in similar lawsuits, and recent estimates say that another \$19.1 billion — minus Palisades' money — will be paid by 2020, according to DOE. Entergy's filing: <http://politico.pro/SekOwH>. Cover sheet with claim amount: <http://politico.pro/S3W13Z>

**NEW RFA BOARD LEADERS:** Neill McKinstry, president of the ethanol division at The Andersons, Inc., is the new chairman of the Renewable Fuels Association's board of directors. McKinstry previously served two terms as vice chairman, a position now filled by Randall J. Doyal, CEO of Al-Corn Clean Fuel.

**THE CARDBORAD MINES OF PERU WORKED OVERTIME ON THIS ONE:** Greens can rest assured: the 160,000 petitions for Jim Lehrer to ask about climate issues during the first presidential debate next week that were dropped off by coalition of environmental groups yesterday didn't waste any paper. The groups dropped off the petitions on thumb drives rather than printed off. Each drive, however, was delivered inside a bankers box. Pics or it didn't happen: <http://bit.ly/Pubx49>

**YOU'RE GONNA NEED A BIGGER REGULATION:** NOAA will consider adding protections for the West Coast's great white shark

population following petitions from environmental groups saying the species is threatened. The Washington Post: <http://wapo.st/Ux6QaH>

THESE ARE ON ME: Tuesday's Morning Energy misstated Cathy Zoi's position. She is the former acting undersecretary at DOE and left the department in 2011. And yesterday's Morning Energy misstated the location of energy discussions this week between the U.S. and India.

#### QUICK HITS

— There's not much in new U.S. Geological Survey data from wells in Pavillion, Wyo., to sway anyone on either side of the fracking debate, the AP writes: <http://bit.ly/SpgUR7>

— BP Products North America has agreed to pay \$210,000 and set up enhanced response programs after failing two unannounced EPA-Coast Guard oil spill exercises. Fuel Fix: <http://bit.ly/QhhAZo>

— California Gov. Jerry Brown on Thursday signed 19 renewable energy and power conservation bills. Los Angeles Times: <http://lat.ms/PIHjvn>

— A Bloomberg poll indicates public support for stricter fracking regulations has dropped to 56 percent this month, down from 65 percent in March. Bloomberg: <http://bloom.bg/Pb8n3N>

— Three people have been charged in connection with the August Eastern Market beating of IHS energy analyst Thomas Maslin. WTOP: <http://bit.ly/UQxbVH>

#### HAPPENING TODAY

8 a.m. — The National Journal and Government Executive hold a forum on cybersecurity, including remarks from Homeland Security Secretary Janet Napolitano. <http://bit.ly/RQFlwJ>. Newseum

11 a.m. — The Environmental and Energy Study Institute and the National Association for State Community Services Programs host a briefing on the Weatherization Assistance Program. <http://bit.ly/RZFrSR>. Congressional Meeting Room North

1:30 p.m. — The National Academies host a webinar on a national strategy for advancing climate modeling. <http://bit.ly/QjvTBd>

THAT'S ALL FOR ME. Have a nice weekend.

\*\* A message from America's Natural Gas Alliance: We believe in a clean energy future. Natural gas is a cleaner energy choice and a key partner to solar and wind technologies. From California to Florida, natural gas facilities are working with renewable energy to ensure steady, affordable and cleaner energy choices for communities across our nation. Because it is an abundant and affordable energy source available right here in America, natural gas can help make the promise of cleaner energy a reality in more American communities. Natural gas is smarter power today. Visit [anga.us](http://anga.us) to learn more. \*\*

#### Stories from POLITICO Pro

Supreme Court's new term includes next round on Kiobel

Supreme Court's new term includes next round on Kiobel back

By Alex Guillén and Jessica Meyers and Erica Martinson | 9/28/12 5:27 AM EDT

The Supreme Court starts its fall term Monday with a complicated torts case arising from the executions of anti-drilling activists in Nigeria, then shifts its environmental focus back to its recent favorites — property rights and the Clean Water Act.

The latter cases include disputes about stormwater pollution from urban lands and logging roads, as well as constitutional "takings" questions regarding flooded forests. Separately, the justices have yet to say whether they will hear a challenge to a clean-truck program in California.

There aren't any energy blockbusters on tap this term — the big D.C. appeals circuit cases over greenhouse gas regulations and

other Obama administration EPA rules aren't yet ripe for high court review. But in the widely watched case regarding the deaths of anti-oil-drilling activists abroad, the court has the chance to weigh in once again on the same corporations-as-people doctrine that played such a big role in *Citizens United*.

On Monday, the court hears new oral arguments for *Kiobel v. Royal Dutch Petroleum*, in which relatives of Nigerian activists killed in the 1990s are trying to use 18th century tort law to pursue a lawsuit in U.S. courts against three companies in the Shell family.

Esther Kiobel, who sued the companies and several subsidiaries on behalf of her late husband and other victims, alleges that the companies were complicit in the killing of the activists by Nigerian military forces. She brought the suit under the Alien Tort Statute, a 1789 U.S. law often used for lawsuits against entities for international crimes.

Human rights groups have said that if the court protects corporations from the statute, the results could bolster large energy and mining companies in countries where the military is willing to act against critics of oil and gas development.

The Supreme Court heard the case in February on the question of whether a corporation can be sued under the statute just like an individual. But a week after hearing arguments, the court ordered a re-argument.

The new question the court plans to consider: Can the statute be used in U.S. courts for crimes that happened abroad — and if so, under what circumstances?

Some observers point out that the narrowed question could let the justices sidestep the broader, more politically fraught question of whether corporations should be immune from Alien Tort Statute lawsuits. That could allow the court to avoid the same denunciations that followed 2010's *Citizens United* ruling, which ruled that corporations have a First Amendment right to spend as much as they wish on independent election ads.

To many critics of the court, it would be especially outrageous for corporations to have the same rights as people when it comes to political spending, but not the same liability for lawsuits.

Several justices earlier this year focused on the more limited question of the case's international aspects.

"Well, there's no particular connection between the events here [in Nigeria] and the United States," Justice Samuel Alito said at oral arguments in February, pointing out that the case was brought by foreigners for actions in a foreign nation. "What business does a case like that have in the courts of the United States? ... There's no connection to the United States whatsoever."

The court probably won't rule in *Kiobel* for several months.

Other environment-related cases on the high court's 2012-13 docket include:

- **Takings:** The court will hear arguments Wednesday in *Arkansas Game & Fish Commission v. United States*, which offers yet another constitutional test stemming from the Fifth Amendment's dictate that the government can't take private property for public use without just compensation.

This time, the Army Corps of Engineers is on the hook as the court examines whether the federal government has to pay a state for damage to wildlife habitats and timber after years of intentional flooding. Between 1993 and 2000, the corps permitted the occasional release of water from Missouri's Clearwater Dam. The flooding destroyed 23,000 acres of Arkansas forest.

The Arkansas Game and Fish Commission took the corps to claims court and was awarded nearly \$6 million. But a federal appellate court overturned the verdict last year, saying the flooding didn't amount to a "taking" of property because it was temporary.

The case harkens to similar legal messes taken up by the Supreme Court in recent years, including a case regarding beach erosion and public-private property rights in Florida, and a case last term about long-standing EPA practices to protect wetlands by restricting the use of private property. All these followed years of the justices quibbling over unclear language in the Clean Water Act.

- **Stormwater runoff:** Two consolidated cases — *Decker v. Northwest Environmental Defense Center, et al.* and *Georgia-Pacific West v. NEDC* — involve a long-standing EPA policy that allows stormwater runoff from forest roads to occur without Clean Water Act permits mandating protections for nearby water bodies. The justices overrode the Obama administration's advice against taking up the case at all.

In an example of strange bedfellows, the timber industry is defending the EPA's interpretation of the water law while environmental groups attack the agency.

Greens say EPA can't exempt roads on logging operations from the definition of "industrial activity" in the law's stormwater provisions. Therefore, they say, the roads should be subject to regulations that EPA set up under a stormwater program prescribed by Congress in 1987.

The timber industry counters that forest and logging roads have been exempt from EPA oversight of runoff pollution since the law's inception. It also says a decision by the 9th U.S. Circuit Court of Appeals overturning the EPA policy threatens to cripple the timber industry.

The court will hear oral arguments in those cases Dec. 3.

- Municipal runoff: On Dec. 4, the court is scheduled to take up Los Angeles County Flood Control District v. Natural Resources Defense Council, which asks who is responsible for stormwater that flows through a concrete channel or some other artificial structure imposed on a river: Is the channel part of a drainage system discharging into the river, or part of the river itself?

The L.A. flood control district operates a drainage system that discharges into the Los Angeles and San Gabriel rivers, and has a permit for discharging polluted stormwater. It's challenging a 9th Circuit ruling that said the county's Clean Water Act permit must include controls for stormwater runoff that collects in channels and river systems that are maintained by the county's flood control agencies.

As with stormwater from logging roads, the Obama administration suggested that the Supreme Court not intervene in the urban stormwater case. The government says the lower court got it wrong, but on technical grounds: 9th Circuit judges misunderstood key facts of the case — mainly, the locations of pollution monitoring stations.

- Trucking: The court has also asked the Obama administration to weigh in on American Trucking Associations v. Los Angeles, in which the ATA is challenging a clean truck program run by the Port of Los Angeles. A lower court upheld much of the program, but the ATA argues that federal law overrules the local regulation. While the Supreme Court has not yet agreed to hear the case, in asking for the administration's viewpoint the justices indicated they are at least interested.back

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